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NO. 91-1593

UNITED STATES SUPREME COURT

October Term, 1991

FRANCISCO JAVIER MUNOZ-ROMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF OF THE UNITED STATES

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Petitioner Francisco Javier Munoz-Romo ("Munoz") files this Reply to the Brief of the United States, showing the Court the following:

I.
INTRODUCTION

Having admitted that Munoz's Constitutional rights were violated on two separate occasions, the United States merely asks this Court "to grant the petition, vacate the judgment, and remand the case for the court of appeals to direct the vacation of two of the sentences imposed under Section 922(g)." Gov't S. Ct. Br. 8. All parties, therefore, agree that the Court should grant the petition. The only remaining question is what form of relief should be granted. Because this case is replete with constitutional violations, and because this is a case of first impression for the Court where a conflict exists among the circuits, Munoz believes that this Court should examine the entire record in this case to decide whether Munoz's constitutional rights were violated in other aspects of the case.

II.
BACKGROUND

Munoz was arrested for selling narcotics. Rather than prosecute him only for the offense for which he was arrested, the United States, in an effort to "railroad" as many offenses as possible, and perhaps realizing that Munoz was not effectively represented by counsel, chose to charge and try him with a myriad of offenses that were completely unrelated to his narcotics offense. Munoz was indicted and sentenced for possession of a firearm by a felon, possession of a firearm by an illegal alien, various counts of money laundering, and the narcotics offense.

The "railroading" did not stop with the indictment and the trial. The United States somehow convinced the trial judge on two different occasions to impose two sentences for the same offense. Munoz was sentenced as a felon-in-possession of firearms and sentenced under the sentence-enhancement statute, 18 U.S.C. § 924(e). The United States has admitted that this double sentence violated Munoz's

Constitutional rights against Double Jeopardy. Gov't C.A. Br. 27.

Munoz was also sentenced under both the felon-in-possession statute and the illegal alien-in-possession statute. That is, Munoz was given two sentences under the same subsection of 18 U.S.C. § 922. Munoz argued before the Court below that this double sentence violated the Double Jeopardy Clause of the Constitution. The Government, knowing that Munoz's position was correct under the law, nevertheless urged the Fifth Circuit Court of Appeals to adopt a position that violated the Constitution. Now, before this Court, the United States has finally admitted that this double sentence violated Munoz's constitutional rights against Double Jeopardy. Gov't S. Ct. Br. 8.

Munoz submits that the violation of his constitutional rights is not limited to the two double sentences that he received. This case is replete with constitutional violations, and for that reason this Court should grant the Petition for Writ

of Certiorari on all questions presented and review the entire record in this case.

III.
THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE SENTENCES IMPOSED FOR VIOLATIONS OF THE FIREARM-POSSESSION STATUTE

A. Allowing Petition to be Charged Under Both Subsections of Section 922 Severely Prejudicial Munoz's Rights to a Fair Trial.

When Munoz was indicted, the United States knew, or certainly should have known, that he could not be charged and sentenced as both a felon-in-possession and an illegal alien-in-possession of a firearm. The United States has now admitted that the trial court was wrong in imposing these double sentences. Gov't S. Ct. Br. 8. Indeed, the position the United States now takes on these Double Jeopardy claims is directly contrary to the position it took before the Court of Appeals. In the lower court, the Government successfully argued that Munoz could be constitutionally sentenced under both subsections of Section 922. See Gov't C.A. Br. 24-26. Now, the Government admits that such a double sentence violates the Double Jeopardy clause of the

Constitution. The United States has, therefore, admitted that the holding of the Fifth Circuit Court of Appeals in this case is wrong. For this reason alone, this Court should grant the Petition. Further, it was undisputed that Munoz was both a felon and an illegal alien. The Government's motive in charging and trying Munoz on both counts, in violation of his constitutional rights against Double Jeopardy, could only be for one reason; to taint the jury with the fact that Munoz had prior felony convictions and the fact that he was an illegal alien. Not only did the introduction of this evidence violate Munoz's rights under the Fifth Amendment of the United States Constitution, it also violated Munoz's due process rights as guaranteed by the Fifth Amendment.

Moreover, as pointed out in his Petition for Writ of Certiorari, evidence regarding Munoz's prior convictions should not have been introduced at the trial. See Pet. Reply Br. at 18-20. The introduction of this evidence, and allowing it to go to the jury room, severely prejudiced Munoz's rights

to a fair trial. Consequently, Munoz asks that this Court grant his petition, vacate the judgments against him, and remand this case to the district court for a new trial.

B. The United States Has Failed to Introduce Sufficient Evidence that Munoz Possessed the Firearms in Question.

Once again, the United States argues that Munoz's occupancy of a residence is sufficient for the jury to conclude that he possessed firearms found at that residence. Gov't S. Ct. Br. 10-12. Congress intended differently when it drafted Section 922, and the Government has failed to prove that Munoz "possessed" these firearms under the relevant definition of possession.

The United States has argued that Munoz constructively possessed the firearms. To prove constructive possession, the Government had to prove that Munoz had the intent and the power to exercise dominion and control over the weapon. See United States v. Smith, 591 F.2d 1105, 1107 (5th Cir. 1979); United States v. Donofrio, 450 F.2d 1054, 1056 (5th Cir. 1970). Thus, the Government was

required to prove both that Munoz intended to exercise dominion and control over the gun and that he had the means available to effectuate his intentions. The Government failed to meet this burden of proof.

To prove that Munoz intended to exercise control over the firearms, the Government was required to prove that Munoz knew of the gun's existence. It is axiomatic that one cannot intend to control a firearm that he does not know exists. Several courts have held, therefore, that the Government must prove that the defendant knowingly possessed the firearm to sustain a conviction under section 922. See United States v. Hastings, 918 F.2d 369, 371 (2d Cir. 1990); United States v. Rumney, 867 F.2d 714, 721 (1st Cir. 1989), cert. denied sub. nom., Taylor v. United States, ___ U.S. ____, 110 S. Ct. 2592 (1990); United States v. Sherbondy, 865 F.2d 996, 1002 (9th Cir. 1988); United States v. Hatfield, 815 F.2d 1068, 1072 (6th Cir. 1987); United States v. Bruce, 704 F.2d 1048, 1049 (8th

Cir. 1983); United States v. Allen, 699 F.2d 453, 458 (9th Cir. 1982).

The evidence here proves only the converse; Munoz had no knowledge that the firearms were located on the premises. Consequently, the Government failed to meet its burden of proof to show constructive possession of the firearm under section 922(g). This Court, therefore, should grant the petition and reverse the convictions for firearm-possession.

IV.
THE GOVERNMENT HAS FAILED TO PROVE ESSENTIAL ELEMENTS OF THE MONEY-LAUNDERING COUNT

A. The Government Failed to Establish the Necessary Nexus.

The United States argues that, because large amounts of cash were found at Munoz's residence, the verdicts and sentences for money-laundering should stand. The United States misses the point.

In order to prove that Munoz violated the money-laundering statute, the United States was required to prove that, when he purchased the property in question, he used the proceeds from illegal

activity. The money-laundering statute is relatively new. Indeed, this Court has not had an opportunity to review the substantive aspects of this statute. The courts that have addressed this statute have ruled that the Government must prove that the property in question was purchased with proceeds which derived from illegal activity. See United States v. Hollis, 1992 W.L. 17974 (10th Cir. 1992) (holding that jury instruction was proper where it informed jury that proceeds had to be criminally derived); United States v. Awan, 996 F.2d 1418, (11th Cir. 1992) ("[G]overnment [must] prove that a defendant knew that the proceeds stemmed from felonious activity.") (emphasis added); United States v. Posters-N-Things, 1992 W.L. 158539 (8th Cir. 1992) ("[T]he Government had to prove that [the defendant] knowingly conducted a financial transaction that involved the proceeds of an unlawful activity . . . ."); United States v. Levine, 1992 W.L. 148203 (10th Cir. 1992) ("[T]he Government must plead and prove the funds involved represented the proceeds of some form of unlawful

activity."). Under this standard, there is no evidence in the record to support the money-laundering convictions.

The United States proved only that Munoz bought several items (a car, a truck, and a house) years prior to his arrest, and years later he was found with large amounts of cash at his house. The Government was in no way able to prove that the cars and the house that he purchased were purchased with the proceeds of illegal activity.

Under the Government's argument, any person who is found with cash from illegal activities could be charged and sentenced with money-laundering, for any property he had purchased in the past, regardless of whether that property was purchased with the proceeds of illegal activity. This is clearly not what Congress intended when it enacted Section 1956. Rather, Congress intended to allow prosecutions of individuals who used the proceeds of illegal activity to purchase items in furtherance of their illegal activity. See Levine, 1992 W.L. 148203 ("A reading of the statute reveals its obvious purpose

to criminalize the use and funds from an illegitimate source in a legitimate transaction"). Hence, the Government is required to prove a nexus between the item purchased and the proceeds of illegal activity.

Several courts have required the United States to establish a causal nexus between illegal activity and particular funds in order to support a conviction or a forfeiture action. See United States v. $4,245,000, 762 F.2d 895, 903 (11th Cir. 1985) (holding that Government must show probable cause that seized property was involved with illegal drug or money-laundering transactions as specified by statutes), cert. denied, 474 U.S. 1056 (1986); United States v. All Monies ($477,048.62), 754 F. Supp. 1467, 1471 (D.Ha. 1991) (same); United States v. 88 Designated Accounts Containing Monies Traceable to Exchanges for Controlled Substances, 740 F. Supp. 842, 845 (S.D.Fla. 1990) (same). Thus, Courts have required the United States to trace the proceeds to the illegal activity. Hence, the Government was required in the instant case to trace

the funds used to purchase the subject property to some form of illegal activity. The Government failed to meet this burden. Accordingly, the trial court should have granted the defendant's motion for acquittal on the money-laundering counts.

This is a case of first impression regarding the substantive portion of the money-laundering statute. The Fifth Circuit's holding in this case is tantamount to a holding that the Government is not required to prove a nexus between the property purchased and some form of illegal activity. This holding, therefore, is in conflict with rulings in other circuits which have held that the Government must establish this causal nexus. This Court, therefore, should grant the Petition and resolve this apparent conflict.

B. The Government Failed to Prove the Necessary Intent.

1. The Necessary Intent to Carry on Illegal Activity

Moreover, the Government failed to produce any evidence in support of another element of the statute; that, at the time Munoz purchased the

properties, he intended to use the properties to carry on a specified unlawful activity or that he intended to use this property to conceal his illegal activity. There is no evidence in the record tending to support this allegation. On this basis, the Government failed to meet its burden of proof.

2. The Necessary Intent to Conceal the Illegal Activity

The Government also failed to prove that Munoz purchased the car, truck, and house with the intent of concealing his illegal activity. Several courts have held that intent to conceal is an element of the money-laundering statute. See Posters-N-Things, 1992 W.L. 158539 ("[The Government must prove] that the financial transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds"). In United States v. Sanders, 929 F.2d 1466 (10th Cir. 1991), the court was presented with an identical question based on nearly identical facts. In Sanders, the defendants were convicted of money-laundering based upon their

purchase of two automobiles, much like two of the money-laundering counts asserted against Munoz. The Tenth Circuit, however, overturned those convictions because the defendants were present when the cars were purchased and the defendants used the cars conspicuously. Thus, the court reasoned, the Government failed to prove the necessary element of concealment.

> We reject the Government's argument that the money-laundering statute should be interpreted to broadly encompass all transactions, however ordinary on their face, which involve the proceeds of unlawful activity. To so interpret the statute would, in the court's view, turn the money-laundering statute into a "money spending statute." This interpretation would be contrary to congress' expressly stated intent that the transactions being criminalized in the statute are those transactions "designed to conceal or discuss the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Thus, by the expressed terms of the statute, a design to conceal or disguise the source or nature of the proceeds is a necessary element for a money-laundering conviction. In other words, the purpose of the money-laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities.

> Further, we agree with Defendant that the evidence of a design to conceal the nature or source of the proceeds used to purchase the cars was insufficient to support her convictions. Clearly the transactions involving the purchase of the Volvo and to a slightly lesser extent the purchase of the Lincoln, differ from what could be described as a "typical money-laundering transaction" in the Sanders' failure to use a third party to make the car purchases and thereby concealed the buyers identities. As outlined above, both Defendant and her husband, Johnny Lee, were present at the purchases and were readily identified by the respective sales persons involved. Further, both cars were conspicuously used by the Sanderses, making the association of these vehicles with the Sanderses obvious to law enforcement.

Id. at 1472 (citations and footnotes omitted).

In Munoz's case, the Government also failed to prove the necessary element of concealment. The record demonstrates that Munoz personally purchased the automobile and truck at issue in this case. The record also demonstrates that Munoz used these vehicles conspicuously, making his association with these vehicles obvious. Clearly, therefore, the Government failed to show that the Munoz had the necessary intent to conceal or disguise the relationship of the cars purchased with the person

providing the proceeds or that the proceeds derived from illegal activity. Under Sanders, the trial court should have acquitted the Munoz of the money-laundering claims.

In sum, the money-laundering convictions are not supported by legally sufficient evidence. Consequently, this Court should grant the petition for writ of certiorari.

V.
MUNOZ'S INEFFECTIVE ASSISTANCE OF COUNSEL CAN EASILY BE DETERMINED FROM THE RECORD BEFORE THIS COURT

The Government argues that there is insufficient evidence in the record to support Munoz's claim of ineffective assistance of counsel. Therefore, the United States argues, Munoz's only right should be to assert the claim in a proceeding under 28 U.S.C. § 2555.

Contrary to the Government's position, there is enough evidence in the record from which this Court can conclude that Munoz's Sixth Amendment rights to effective assistance of counsel were violated. First, Munoz was twice exposed to Double Jeopardy,

as the Government has already admitted. Yet, his counsel did not even raise the Double Jeopardy defense. See Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990) (holding that failure to raise double jeopardy defense constitutes ineffective assistance of counsel under the standards set forth in Strickland v. Washington).

Further, as stated in the Petition for Writ of Certiorari, the record in this case has ample evidence of Munoz's ineffective assistance of counsel. See Pet. at 18-21.

This Court has the power and authority to address Munoz's claims that he was denied his right to effective assistance of counsel. Given the gravity and severity of the errors and omissions made by Munoz's trial counsel, this Court should exercise that power and authority and remand this case to the district court for a new trial at which

Munoz can be given effective assistance of counsel.

CONCLUSION

For all the reasons stated herein, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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